

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JZK, INC., and JZ KNIGHT,

Plaintiff,

v.

GLEN MORGAN and LAUREN  
MORGAN; and EVERGREEN  
FREEDOM FOUNDATION,

Defendants.

CASE NO. C14-5410 BHS

ORDER DENYING  
DEFENDANTS' ANTI-SLAPP  
MOTION, DENYING THE  
PARTIES' MOTIONS FOR  
SUMMARY JUDGMENT, AND  
DENYING OTHER MOTIONS AS  
MOOT

This matter comes before the Court on numerous motions filed by both parties (Dkts. 29, 30, 40, 46, 54, 66, 70, 79). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby rules as follows:

**I. PROCEDURAL HISTORY**

On May 16, 2014, Plaintiffs JZK, Inc., and JZ Knight ("Plaintiffs") filed a complaint against Evergreen Freedom Foundation, Glen Morgan, and Lauren Morgan ("Defendants") asserting (1) a claim for copyright infringement and (2) a claim for tortious interference with contract relationship. Dkt. 1.

1 On May 29, 2014, Plaintiffs filed an amended complaint dropping the state law  
2 claim for tortious interference. Dkt. 26.

3 On June 26, 2014, Defendants filed a motion for summary judgment on Plaintiffs'  
4 copyright claim (Dkt. 29) and filed a motion for attorney's fees, costs, and monetary  
5 award pursuant to RCW 4.24.510 and 4.24.525 (Dkt. 30), which is commonly referred to  
6 as Washington's "anti-SLAPP" law.<sup>1</sup> On July 14, 2014, Plaintiffs responded to  
7 Defendants' motions. Dkts. 42 & 46. On July 15, 2014, Plaintiffs filed an erratum  
8 stating that they intended their opposition to also be a cross-motion for summary  
9 judgment. Dkt. 47. On July 18, 2014, Defendants replied to Plaintiffs' response. Dkt.  
10 60. On August 4, 2014, Defendants responded to Plaintiffs' motion. Dkt. 69. On August  
11 8, 2014, Plaintiffs replied. Dkt. 74.

12 On July 10, 2014, Plaintiffs filed a motion to continue the summary judgment  
13 motion pursuant to Fed. R. Civ. P. 56(d). Dkt. 40. On July 17, 2014, Defendants  
14 responded to Plaintiffs' motion to continue. Dkt. 49. On July 18, 2014, Plaintiffs filed a  
15 reply (Dkt. 57) and Defendants replied to both of their motions (Dkts. 58 & 60).

16 On July 17, 2014, July 31, 2014, and August 5, 2014, Defendants filed motions to  
17 strike certain evidence Plaintiffs submitted in support of their positions. Dkts. 54, 66, 70.

18 On August 21, 2014, Defendants filed a motion to continue the initial case  
19 deadlines until the Court issues a ruling on the pending motions for summary judgment.  
20 Dkt. 79.

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22 <sup>1</sup> SLAPP is an acronym for Strategic Lawsuits Against Public Participation.

## II. FACTUAL BACKGROUND

This dispute arises from Defendants' use of what Plaintiffs' contends are copyrighted performances. Because Defendants have not obtained Plaintiffs' copy of what is allegedly the full performance, underlying evidentiary issues must be resolved before dispositive issues may be addressed.

## III. DISCUSSION

### A. Anti-SLAPP

The Washington anti-SLAPP law provides, in relevant part, that "[a] party may bring a special motion to strike any claim that is based on an action involving public participation" as defined in the statute. RCW 4.24.525(4)(a).

In this case, Plaintiffs argue that Defendants' motion is moot because Plaintiffs have voluntarily amended their complaint to remove the state law claim. The Court agrees. In *Henne v. City of Yakima*, 177 Wn. App. 583 (2013),<sup>2</sup> the court held that an anti-SLAPP issue was moot once the plaintiff moved to amend his complaint to remove the challenged claims. *Id.* at 588. In fact, the plaintiff even moved to amend his complaint *after* the defendant filed its motion to strike. *Id.* In light of this precedent, the Court finds that Plaintiffs' voluntary dismissal before Defendants filed their motion makes this issue moot.

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<sup>2</sup> Defendants argue that *Henne* is "inadequate precedent" because the Washington Supreme Court has granted review. Dkt. 58 at 7. This argument is wholly without merit, especially if the court upholds the decision.

1 With regard to Defendants' argument that they were forced to respond to  
2 Plaintiffs' motion for a temporary restraining order, there is some authority for the  
3 proposition that the Court may evaluate any prejudice suffered by the responding party.  
4 *Henne*, 177 Wn. App. at 588 ("Absent prejudice, dilatory practice, or undue delay"  
5 plaintiff may voluntarily amend the complaint.). Defendants, however, can hardly claim  
6 prejudice by submitting approximately two and a half pages in response to Plaintiffs'  
7 emergency motion. *See* Dkt. 19 at 8–10. Moreover, the goal of the legislature has been  
8 achieved with Plaintiffs' quick dismissal of their state law claims. Therefore, the Court  
9 finds that Defendants have failed to show prejudice and denies Defendants' motion as  
10 moot.

11 **B. Summary Judgment**

12 In this case, Defendants move for summary judgment on Plaintiffs' claim for  
13 copyright infringement, and Plaintiffs move for summary judgment on the same claim.  
14 The fundamental problem is that Plaintiffs have improperly filed evidence under seal and  
15 have refused to produce such evidence to Defendants.<sup>3</sup> Even if Defendants have refused  
16 to participate in discovery, due process compels Plaintiffs to show Defendants the  
17 evidence that Plaintiffs have submitted in support of their opposition and motion. It  
18 defies logic to request a court to enter judgment against Defendants based on evidence  
19 that Defendants are unable to view and/or challenge. The Court finds that resolution of

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21 <sup>3</sup> The Court granted the motion to seal evidence submitted with the temporary restraining  
22 order briefing. Evidence submitted with the summary judgment briefing requires a new motion  
to seal. Therefore, the Court will unseal the material unless a motion or request to return the  
material is filed no later than September 19, 2014.


1 this threshold discovery issue will narrow the dispositive issues in this case. While issues  
2 such as authorship and fair use may still need to be determined, the summary judgment  
3 motions are denied without prejudice. Moreover, any party shall request leave of Court  
4 before filing another motion for summary judgment, and the request shall identify the  
5 specific issues that will be addressed in the proposed motion. Therefore, the Court denies  
6 the parties' motions for summary judgment.

#### 7 **IV. ORDER**

8 Therefore, it is hereby **ORDERED** that

- 9 1. Defendants' motion for attorney's fees, costs, and monetary award pursuant  
10 to RCW 4.24.510 and 4.24.525 (Dkt. 30) is **DENIED**;
- 11 2. Defendants' motion for summary judgment on Plaintiffs' copyright claim  
12 (Dkt. 29) and Plaintiffs' cross-motion for summary judgment (Dkt. 46) are  
13 **DENIED**; and
- 14 3. Plaintiffs' motion to continue (Dkt. 40), Defendants' motions to strike (Dkt.  
15 54, 66, 70), and Defendants' motion to continue initial case deadlines (Dkt.  
16 79) are **DENIED as moot**.

17 Dated this 10 day of September, 2014.

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19 BENJAMIN H. SETTLE  
United States District Judge